STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DEBRA KAY JUAREZ, a/k/a
DEBRA KAY AUKERMAN,

Defendant-Appellant.

UNPUBLISHED
April 11, 1997

No. 180534
Kalamazoo Circuit Court
LC No. 94-000274-FC

Before: Bandstra, P.J., and Hoekstra and S.F. Cox*, JJ.

PER CURIAM.

Defendant was convicted by a jury of four counts of first-degree criminal sexual conduct (CSC-I), MCL 750.520b(1)(a) and (b)(ii); MSA 28.788(2)(1)(a) and (b)(ii), and five counts of third-degree child abuse, MCL 750.136b(4); MSA 28.331(2)(4). Defendant was sentenced to twenty-five to fifty years' imprisonment for each CSC-I conviction and to sixteen to twenty-four months' imprisonment for each child abuse conviction. Defendant appeals as of right, and we affirm.

Defendant first contends that there was insufficient evidence presented at trial to support her four CSC-I convictions. Additionally, defendant argues that even if the jury believed that defendant penetrated the victim's vagina, the penetrations were not done for a sexual purpose and could not have constituted the offense of CSC-I. Defendant relies on a statement by our Supreme Court in *People v Hunt*, 442 Mich 359, 364; 501 NW2d 151 (1993), in arguing that CSC-I requires evidence of a sexual purpose on the part of the perpetrator. We believe defendant's reliance on this one statement, which had nothing to do with any issue being decided in that case is misplaced. Despite this off-hand reference to the contrary, it is well-settled that an act of CSC-I is committed when there is an intrusion into the genital or anal opening of another under one of the circumstances enumerated in the statute, regardless of the sexual purpose of the perpetrator or lack of such a purpose. *People v Anderson*, 111 Mich App 671, 677-678; 314 NW2d 723 (1981); *People v Garrow*, 99 Mich App 834, 837-838; 298 NW2d 627 (1980). Therefore, if the jury believed that defendant intruded into the victim's vagina as alleged by the victim, they would have had sufficient evidence from which to conclude that

* Circuit judge, sitting on the Court of Appeals by assignment.

defendant committed a sexual penetration, MCL 750.520(l); MSA 28.788(1)(b), and was therefore guilty of CSC-I.

Here, after reviewing that evidence presented in a light most favorable to the prosecution, *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), we find sufficient evidence was presented from which the jury could have found that the essential elements of CSC-I were proven. Plaintiff's argument on appeal that she was merely touching the child's genitals for hygienic purposes is not supported by the evidence introduced at trial, and there was ample evidence from which the jury could have concluded otherwise. Furthermore, although defendant's challenge to the constitutionality of the statute is unpreserved, we note that the statute as applied to defendant is not overbroad, as defendant's acts of penetration were not innocent and fall squarely within the conduct intended to be prevented. See *Anderson, supra* at 679.

Defendant next argues that prejudicial error occurred during her trial because the trial court improperly admitted hearsay testimony, evidence of prior bad acts, and irrelevant evidence. We disagree. Much of the alleged hearsay was not objected to at trial and, therefore, will not be reviewed on appeal absent manifest injustice, *People v Federico*, 146 Mich App 776, 791; 381 NW2d 819 (1985). Here, we find no manifest injustice will result from our failure to review these unpreserved allegations of error. With regard to defendant's preserved claims of error, although we agree that Kai Jackson's testimony about the victim's explanation of her inconsistent report to Protective Services constituted inadmissible hearsay, we find its admission to have been harmless error. *People v Rodriquez (On Remand)*, 216 Mich App 329, 332; 549 NW2d 359 (1996). Furthermore, the trial court did not abuse its discretion by admitting evidence of defendant's prior "bad acts" pursuant to MRE 404(b)(1), *People v Vandervliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993), *People v Biggs*, 202 Mich App 450, 452-453; 509 NW2d 803 (1993), as well as certain testimony that defendant now brands as irrelevant, *People v Bahoda*, 448 Mich 261, 289; 531 NW2d 659 (1995).

Defendant's contention that the trial court erred by refusing to instruct the jury regarding third-degree child abuse as a lesser offense of CSC-I is likewise without merit. As defense counsel conceded at trial, third-degree child abuse is neither a lesser-included offense nor a cognate offense of the CSC-I counts. Furthermore, the evidence introduced at trial did not support the giving of this requested instruction.

With regard to defendant's claims of prosecutorial misconduct, we believe that the alleged misconduct, most of which was not objected to, either was not improper conduct or could have been cured by a timely objection and curative instruction. *People v Stanaway*, 446 Mich 643; 521 NW2d 557 (1994). Thus, we find no error warranting reversal on this basis.

Defendant also maintains that her trial counsel rendered ineffective assistance because he failed to call as a witness a physician who had allegedly prescribed certain treatment for defendant to administer to the victim and failed to introduce specific testimony regarding the treatment. By affidavit, defendant's trial counsel averred that he elected not to call the doctor as a witness because the doctor had not examined the victim regarding this ailment, and counsel feared that the doctor's testimony would be vulnerable on cross-examination.

This Court will not substitute its judgment for that of trial counsel regarding matters of trial strategy, nor will it assess counsel's competence via the benefit of hindsight. *People v Barnett*, 163 Mich App 331, 338; 414 NW2d 378 (1987). The decision whether to call witnesses is a matter of trial strategy, and the failure to do so can constitute ineffective assistance of counsel only when it deprives the defendant of a substantial defense, *i.e.*, one that might have made a difference in the outcome of the trial. *People v Hyland*, 212 Mich App 701, 710; 538 NW2d 465 (1995), vacated in part on other grds, 435 Mich 900; 554 NW2d 899 (1996). In this case, we find that defendant has not shown that her trial counsel's performance was below an objective standard of reasonableness under prevailing professional norms and that there is a reasonable probability that, but for counsel's alleged error, the result of the proceedings would have been different. *Stanaway*, *supra* at 687-688.

Finally, defendant argues that her sentences for the CSC-I convictions are disproportionately severe, and were imposed on the basis of punishment alone. We disagree. The sentences are within the sentencing guidelines' range and are therefore presumptively neither excessively severe nor unfairly disparate. *People v Broden*, 428 Mich 343, 354-355; 408 NW2d 789 (1987). Although defendant's sentences were clearly intended to punish defendant, there is some evidence in the record that they were also fashioned with reference to factors in addition to punishment. See *People v Snow*, 386 Mich 586, 592; 194 NW2d 314 (1972). We believe that the sentences are proportionate to the seriousness of the circumstances surrounding the offenses and the offender. *People v Milbourn*, 435 Mich 630, 635-636, 654; 461 NW2d 1 (1990).

Affirmed.

/s/ Richard A. Bandstra
/s/ Joel P. Hoekstra
/s/ Sean F. Cox